(13)

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942-43

No. 1033

PAUL DOUCHAN,
Petitioner and Appellant below,
vs.
UNITED STATES OF AMERICA,
Appellee below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To: The Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted in the United States Court by the Grand Jury for the Eastern District of Michigan, South-

ern Division, at the June term of 1938, and charged with violations of Section 52 (B), Title 11, U. S. C.

The indictment charged petitioner in two counts with wilfully, maliciously, knowingly and fraudulently concealing from Theodore Hughes, Trustee of petitioner's estate in bankruptcy upon *August 15, 1936,* real estate bonds of Bankers Trust Company of Detroit, Michigan, of the par value of $6,200, Series N. 1452, and real estate bonds of said Bankers Trust Company with a par value of $20,000, Series N. 1452 (R. 113-114).

At the trial, the Government contended, and offered evidence to show, that the bonds were the property of petitioner and not his brother, Mike Prodanov, and that the transfers were made by petitioner to avoid his creditors; while petitioner contended, and offered evidence to show, that the bonds in question were purchased by him for and on behalf of his brother, Mike Prodanov (the petitioner having changed his name through the Probate Court from Paul Douchan Prodanov to Paul Douchan, R. 49); and that the money was furnished by his brother, Mike Prodanov, who was a blacksmith living in New York at the time of the purchase but who later moved to Detroit.

Petitioner's voluntary petition in bankruptcy was filed February 19, 1936, and disclosed debts in the amount of $54,000 and no assets.

The then counsel for petitioner at the trial stipulated that all of these $26,200 worth of Bankers Trust Company bonds, Series No. N. 1452, previously registered in the name of Paul Douchan, petitioner herein, were identically the same bonds as were later transferred as follows:

On September 21, 1934, Paul Douchan (petitioner) transferred $23,200.00 worth of these bonds to Earle W. Evans; on November 27, 1934, Paul Douchan (petitioner) trans-

ferred $4,700.00 of these bonds to Earle W. Evans; on November 27, 1934, Earle W. Evans transferred back to Paul Douchan (petitioner) $20,000.00 worth of the same bonds; on April 6, 1936, Earle W. Evans transferred $6,200.00 worth of the same bonds to Mike Prodanov; on April 7, 1936, Paul Douchan (petitioner) transferred $20,000.00 worth of these same bonds to Mike Prodanov. No evidence of consideration was shown for any of the transfers (R. 33).

Hughes, the Trustee from whom petitioner was charged with concealing the bonds on August 15, 1936, did not testify but counsel for petitioner, in order to coöperate and avoid loss of time waiting for Trustee Hughes, who failed to appear in the trial court, admitted that none of the bonds mentioned in the indictment were received or turned over to Mr. Hughes, the original Trustee (R. 35-36). Nevertheless Donald P. Kipp, over objection by petitioner's counsel, testified that he was appointed trustee on the 30th day of September, 1937, and that neither the petitioner or his brother, Mike Prodanov, turned over the bonds to him (R. 28-29).

The files in the petitioner's bankruptcy case were introduced in evidence by the Government (R. 11) and Malcolm Shaw, a deputy clerk of the Court, testified that on August 19, 1936, a petition for discharge was filed; and that on October 2, 1936, specification and appearance of Mammie Crawford, a creditor, in opposition to discharge was filed (R. 137). The certified copy of the calendar entries in the bankruptcy proceedings show that several hearings were had on the above specifications in opposition to discharge, and on February 18, 1937, the Trustee's final report of no assets was filed, followed by an order closing the estate entered by the Referee in Bankruptcy on March 31, 1937 (R. 103-104). The report of the Referee on specifications

in opposition to discharge recommended objections to petitioner's discharge be overruled and said bankrupt's discharge be granted (R. 116-124).

The docket further shows that in December, 1941, petitions by creditors to reopen the bankrupt estate were again filed with the Referee in Bankruptcy and several hearings had thereon; and on March 25, 1942, an order for re-reference was entered; exceptions to findings of the Referee as Special Master were denied on May 18, 1942; following this Herbert J. Pevos was elected trustee and qualified; on June 15, 1942 an order was entered setting aside and quashing order for reopening of estate; and on June 30, 1942, an order was entered again closing the file (R. 105-108) and pursuant thereto an order was entered by the United States District Judge—"* * * It is further ordered that the discharge of the above named bankrupt be and the same is hereby reinstated and perpetuated" (R. 136).

NOTE: In respect to the rules of this Court to be concise, counsel includes only those portions of the instructions which relate directly to the proposition presented in this application.

The Court instructed the jury as follows:

> "Ladies and Gentlemen of the Jury: The defendant here, Paul Douchan, is charged with a violation of Section 52 B, Title XI of the Bankruptcy Code of the United States Code, which reads as follows:
>
> > 'A person shall be punished by (and the punishment is given) upon conviction of the offense of having knowingly and fraudulently (1) concealed from the Receiver or Custodian, Trustee, Marshall, or other officer of the Court charged with the control or custody of property, or from creditors in any proceedings under this Bankruptcy Act any property belonging to the estate

of a bankrupt or (2) making a false oath in or relation to any proceedings under this act or (3) presented under oath any false claims for proof against an estate of a bankrupt'—

That doesn't apply here. Number (3) doesn't apply here. Number 4 doesn't apply. Number 5 'Receive or attempt to obtain any money or property.' I think the rest does not apply. That is right, the punishment is provided in the first part of the Act (R. 87).

"The charge is in two counts that Paul Douchan wilfully, knowingly, and fraudulently concealed certain of his assets in one group, $20,000 in bonds of Bankers Trust Company, and in another group some $6,000 in bonds of the Bankers Trust Company (R. 88).

"The Government in this case claims that Paul Douchan over a period of years and because he was harrassed by creditors, sought to play both fast and loose with the property he had, that he was real owner of the Vancouver Hall Apartments, and that in 1930, he was in trouble with a man by the name of Crawford. Now, the merits of Crawford's claim is no part of this case, I mean whether he had a good clear claim or whether he didn't have a good claim is immaterial. The fact remains that the defendant presented his name as among those whom he owed and it is part of the $52,000.00 of liabilities. But whether Crawford had a good claim or not is immaterial. The claim is that Crawford, I think, in 1930 tried to sue the defendant, Douchan. He didn't succeed and then shortly thereafter in 1931, a deed was made out to Mike Prodanov, his brother. Douchan is the brother admittedly of Prodanov. It is the claim of the Government that at that time, Prodanov gave a power of attorney back to Paul and that in that way, Paul really protected his interest in the property" (R. 91).

The Court then instructed the jury as to circumstantial evidence and continued thus:

> "On the other hand, if you feel that the circumstances plus the admitted facts convince you beyond a reasonable doubt that they were Paul Douchan's bonds and he did this, went through these various steps as a protection to himself and that he should, if they were hid, he should have made a disclosure to the Bankruptcy Court, then of course, Paul Douchan is guilty, here and I don't want to go into the various claims of the Government showing that this is the only reasonable conclusion that you can arrive at" (R. 92).

The record reveals that the indictment was not read to the jury, or given to the jury, by the Court or otherwise, and that the elements of the offense, date, place, or vicinage of the alleged offense was not stated or explained to the jury at any time during the trial or in the Court's instructions.

The instructions concluded, the case was submitted to the jury, and the jury returned a verdict of "guilty as charged" (R. 97).

Whereupon petitioner was sentenced to a penitentiary for and during a term of two years on each count, the terms of imprisonment to run concurrently (R. 98).

A motion by petitioner to set aside verdict and vacate sentence or a new trial was heard and denied by the trial judge (R. 137-146).

Petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit and judgment and sentence of the District Court was affirmed April 15th, 1943.

In the motion for a new trial and on appeal, petitioner contended in part that the Court's error in charging the

jury in the terms of the amended statute, rather than in the terms in effect at the time of the alleged offense, thus introducing the inapplicable element of concealment from creditors, in conjunction with the Court's repeated statement in the instructions that the Government's contention was that petitioner had concealed his property from creditors and the considerable evidence of petitioner's difficulties with creditors in 1930, led the jury to believe that petitioner could be found guilty as charged if he simply made transfers in fraud of creditors, while in fact the only crime of which he could have been guilty in 1936, was concealment of his assets from the Trustee, as charged in the indictment.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court, in that the said Court held that a verdict based on either of two or more acts, one of which was not an offense and two of which were not included in the indictment, was a valid verdict, in conflict with *Pierce v. United States,* 314 U. S. 306, *Stromberg v. California,* 283 U. S. 359, and *Coffin v. United States,* 156 U. S. 432.

2. The Circuit Court of Appeals has sanctioned a proceeding wherein the lower court so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision, in the respect specified in the preceding paragraph.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this court, directed to

the United States Circuit Court for the Sixth Circuit commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket Number 9145 —Paul Douchan, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States, and the judgment herein of said Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and for such further relief as to this Court may seem just.

Dated May 15, 1943.

PAUL DOUCHAN,
By CHARLES A. MEYER,
Counsel for Petitioner,
1925 Dime Building,
Detroit, Michigan.

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942-43

No.....

PAUL DOUCHAN,
Petitioner and Appellant below,
vs.
UNITED STATES OF AMERICA,
Appellee below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion in the Circuit Court of Appeals of the Sixth Circuit was entered April 15, 1943, and is reported in *United States v. Paul Douchan,* 134 Fed. (not published at this date) and appears opposite page No. 150 in the certified record and proceedings furnished by the clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

II.

JURISDICTION

1. The date of the judgment of the Circuit Court of Appeals to be reviewed is April 15, 1943.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Act of February 24, 1933, c 119, U.S.C. Title 18, Section 688. Rules No. 11 and No. 13 of "Rules of Criminal Procedure after plea of guilty, verdict, or finding of guilt"—promulgated May 7, 1934. Article 1, Section 9 (Paragraph 3—Ex-Post Facto Law); Article 3, Section 1 and 2, and the 5th Amendment of the Constitution for the United States of America. Section 240 a of the Judicial Code as amended (U.S.C. Title 28, Section 347 a). Section 256 of the Judicial Code as amended (U.S.C. Title 28, Section 371).

3. Petitioner was charged with an offense against the United States on two counts—concealing on August 15, 1936 property from his trustee in Bankruptcy (R. 113-115) under Title 11, Section 52 (b1), effective as of August 17th, 1926, and required to stand trial for a multiplicity of offenses according to the theory of the Government's attorneys as reflected by the proceedings at the trial (R. 11-87) and the instructions of the Court (R. 87-97) under Title 11, Section 52 (b1 and 2) effective as of September 22, 1938, the latter act creating additional offenses greatly widening its scope and increasing the punishment and penalties. Petitioner was found guilty and sentenced on each count (R. 97-98). Motion to set aside verdict was denied by the trial Court. Upon appeal to the Circuit Court for the Sixth Circuit the judgment and sentence of the lower Court was affirmed and opinion filed April 15, 1943—all contrary to the provisions of the Fifth Amendment to the Constitution for the United States.

See Appendix for successive forms of Title 11, Section 52 (b).

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition under A (pp. 1-7) which is hereby adopted and by this reference made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that a verdict based on either of two or more acts, one of which was not a crime when committed and two of which were not included in the indictment, should not be reversed.

V.

ARGUMENT

The jury's verdict of "guilty" in this case might have been based on a belief that the petitioner had committed any one of three offenses shown in the evidence and described in the instructions as a crime charged against the petitioner: (1) Concealment of assets from creditors; (2) a false oath (3) concealment of assets from the Trustee.

The first of these, concealment of assets from creditors, was not a crime at the time petitioner was alleged to have committed it. The crime or offense at that time—August 15, 1936—being concealment from creditors in composition.

Neither the first nor the second of these, the false oath, was charged in the indictment.

But all three were included in the evidence and all three were included in the instructions.

The jury's verdict of "guilty" might have been based on a belief that the petitioner had committed any one of the three.

Only the last of the three, concealment from the Trustee, was charged in the indictment. Only as to the last of the three was the petitioner protected against double jeopardy. Only as to the last of the three was petitioner notified of the accusation or given an opportunity to prepare to defend himself.

How did this happen?

It is obvious from the Court's reading the statute (11 U.S.C.A. 52 (b)) in its presently amended form, and from the Court's admission of a great deal of evidence relating to concealment from creditors, that the Court was not aware that the statute had been amended subsequent to the date of the crime charged in the indictment, nor that concealment from creditors in any bankruptcy proceeding was not a crime on that date. (See Appendix for successive forms of statute, Title 11, Section 52 (b).) The Court therefore conducted the case, and charged the jury, on the erroneous assumption that the defendant was also charged with concealing his assets from his creditors, and making a false oath in or relation to any proceedings under this Act.

The jury without benefit of hearing or reading the indictment, naturally assumed from the scope of the testimony and most of all, from the Court's instructions, that petitioner was also accused of concealing his assets from his creditors and perhaps of making a false oath.

The petitioner, unprepared to stand trial for matters of which he had not been accused, was found by the jury "guilty as charged."

Judge Allen of the Circuit Court of Appeals in her opinion, states that "guilty as charged" means "guilty as

charged in the indictment, and not as inadvertently read by the court" (pp. 6, 7 of opinion).

But the jury had no means of knowing what was charged in the indictment, and relied upon the explanation and instructions of the Court, including the Courts statement that "the Government in this case claims that Paul Douchan over a period of years and because he was harassed by creditors, sought to play fast and loose with the property that he had, that he was the real owner of the Vancouver Hall Apartments, and that in 1930, he was in trouble with a man by the name of Crawford * * *the claim is that Crawford, I think, in 1930, tried to sue the defendant, Douchan. He didn't succeed and then shortly thereafter in 1931, a deed was made out to Mike Prodanov, his brother * * *. It is the claim of the Government that at that time, Prodanov gave a power of attorney back to Paul and that in that way Paul really protected his interest in the property."

The indictment was for concealing bonds, not real estate or an apartment house; and from the Trustee, not from Crawford, a creditor.

Briefly then, it clearly appears that petitioner was indicted for one offense and tried for at least three offenses. This case is controlled by the recent case of *Pierce v. U. S.*, 314 U. S. 306, 362, 86 L. Ed. 226 (1941) where this court said (p. 310):

> "So closely entwined were the TVA and the Government (The United States) in the instructions and the evidence on the various counts that any jury might well have thought a pretense that Pierce was an employee or officer of the TVA violated the statute and have voted for conviction for that reason. This, however, in our view, is incorrect, and constitutes prejudicial error. *Cf. Warszower v. United States,* 312 U. S. 342 * * *

> *Stromberg v. California,* 283 U. S. 359, * * * *Nash v. United States,* 229 U. S. 373 * * *. The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States."

In the same way at bar, so closely entwined were the creditors and the Trustee in the instructions and the evidence on the two counts that any jury might well have thought that concealment of assets from creditors violated the statute and have voted for conviction for that reason This we contend was incorrect and constituted prejudicial error. The statute in effect at the time of the commission of the alleged offenses did not speak of concealment from creditors in other than composition proceedings.

In *Hummer v. Commonwealth,* 94 S. E. 157, 122 Va. 826, (1917) a section of the Code created two offenses, *unlawful* cutting and *malicious* cutting. The defendants were indicted for "unlawful" cutting. The Court, in its instruction, read the entire section, including the inapplicable portion respecting "malicious cutting."

Reversing the convictions, the Court, with considerable reason, said (p. 158).

> "We cannot say that the jury was uninfluenced by the action of the court in permitting them to try the prisoners for malicious cutting instead of confining them to the charge of unlawful cutting as set out in the indictment. The commonwealth charged these defendants with an unlawful and felonious but not a malicious act. They had an absolute and constitutional right to be tried accordingly."

So at bar, petitioner had an absolute and constitutional right to be tried in accordance with the unamended statute

which imposed no penalty for concealment from creditors except in composition cases.

> "Due process of law" it is said in *Cooley's Constitutional Limitations,* p. 434 (6th ed.), "in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

People v. Crane, 302 Ill. 217, 134 N. E. 99 (Ill. Sup. Ct. 1922), was a case involving instructions which were subject to the same defect.

This was a prosecution for taking indecent liberties with a child, in which the court's instruction defined the crime in the language of the statute which defined not only the crime with which the defendant was charged, but also the distinct crime of attempting to commit it.

The Court, in reversing the conviction, said (p. 103):

> "Under the instruction given, if the jury thought that the evidence showed an attempt to take indecent liberties but that it did not show the accomplishment of the crime, they might nevertheless have felt justified, under the circumstances, in returning a verdict of guilty under a charge of taking indecent liberties, though the proof showed an attempt only. Counsel for the state argue that it is not error to give an instruction in the language of the statute. This is sometimes true, but when the statute defines more than one crime as in the case in the section referred to, such rule cannot apply, the contemplation of the law is that the jury shall be instructed only covering the crime of which the defendant stands charged, and it is not a sufficient answer to say that the instruction is in substantially the language of the statute. *People*

> *v. Jones,* 263, Ill. 564, 105 N. E. 744. Without discussing further the testimony which is in this opinion set out pertaining to the crime charged, we are of the opinion that the giving of this instruction was prejudicial error."

The rule should be even stronger here where the obnoxious portion of the statute was not inapplicable but had not been enacted into law.

In *Stromberg v. California,* 283 U. S. 359 (1930), this Court held, quoting the fifth headnote as given in 75 L. Ed. 1118:

> "A conviction must be set aside where the verdict of guilty did not specify the ground upon which it rested, and the jury were instructed that their verdict might have been given with respect to any one of the three clauses of the statute the violating of which was charged, and one of the clauses is unconstitutional."

Certainly then a conviction should be set aside where the jury were so instructed that the verdict might have been given with respect to a clause of the statute not yet enacted at the time the offense took place.

The Missouri Supreme Court in *St. Louis v. Slupsky,* 162 S. W. 155, 49 L. R. A. (N. S.) 919, in reversing a conviction under an instruction "that if the defendant used indecent, unseemly, profane, obscene and offensive language in the presence of the Princes (two persons with whom he had the altercation) and if their peace or the peace of either of them was actually disturbed thereby, they should find him guilty" (p. 922 of L. R. A.), whereas the ordinance forbade disturbances of "the peace of others by violent, etc. * * * conduct or carnage * * * etc. calculated to provoke a breach of the peace," said, after pointing out the

additional element of being "calculated to provoke a breach of the peace" (p. 919):

> "It is true that we have no doubt the language attributed to Mr. Slupsky would have filled all the requirements of the ordinance, but it is not within our province to constitute ourselves a jury in a case of this character, and, in the absence of a plea to that effect, find him guilty of an offense other than that upon which the verdict was found.
>
> "The judgment of the Court of Criminal Conviction is reversed, and the cause remanded."

A similar case is *Poole v. State*, 170 S. E. 309 (G. App. 1933), where it was held, quoting the fourth headnote:

> "In prosecution for murder by automobile, instruction embodying invalid part of statute prohibiting speed greater than is 'reasonable and safe' held prejudicial."

In instructing the jury in *Dumbrowski v. State*, 90 S. W. (2) 973, 192 Ark. 263 (1936), the Court made the mistake of reading the statute in its former form when the statute in question had in fact been amended at the time of the offense. This is the converse of the situation at bar, where the Court made the mistake of reading the statute as amended when the unamended statute was applicable.

The change in the law in the Dumbrowski case was less material than at bar, in that (p. 974) "The age of the child in the original act is twelve years, and in the amended act, fourteen years," the crime being non-support.

The Court said simply that "the court erred in reading it to the jury, as the law upon which the charge was based."

In *Coffin v. United States*, 156 U. S. 432, this Court held, quoting the ninth headnote, that

> "that part of the charge given by the court in which the questions of misapplications and of

> false entries are interblended in such a way that it is difficult to understand exactly what was intended, and which implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute, was erroneous."

Judgment was reversed and a new trial granted.

> "We think the language used," said the Court (p. 462) "must have tended to confuse the jury and leave upon their minds the impression * * * that an entry would be false, though it faithfully described an actual occurrence, unless the transaction * * * involved full and fair value for the bank."

In *Jones v. State,* 3 S. W. 478, 22 Tex. App. 680, the Court said (p. 479):

> "The charge copies the whole of article 470 of the Penal Code, which article defines two separate and distinct offenses (*Holden's Case,* 18 Tex. App. 91) with but one of which offenses the defendant was charged. The charge of the Court should have been limited to the *law of the case* * * * the case as made by the indictment and the evidence. *Tooney v. State,* 5 Tex. App. 163."

The conviction was set aside.

See also:

People v. Pereles, 12 P. (2) 1093, 125 Cal. App. (Supp.) 789 (1932).

Jones v. State, 3 S. W. 478, 22 Tex. App. 680.

Poole v. State, 170 S. E. 309, 47 Ga. App. 303 (1933).

People v. Flynn, 38 N. E. (2) 49, 378 Ill. 351 (1942).

It is now well recognized and a traditional principle that appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, where life or liberty is involved, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings:

> *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 84 L. Ed. 1129.
> *United States v. Atkinson,* 297 U. S. 157, 80 L. Ed. 555.

In *Miller v. United States,* 120 Fed. Rep., second series, 968, Judge Huxman of the Circuit Court of Appeals for the Tenth Circuit on pages 972-3 concisely sets forts the principles in this regard which this Honorable Court has established and uniformly sustained:

> "Two of the defendants requested no instruction on character testimony, and none of them excepted to the instruction given by the court. Their failure in this respect does not, however, preclude us from examining the instruction. Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court, *Troutman v. United States,* 10 Cir. 100 F. 2d 628, 634, or even where the error was not preserved for review by proper objection, exception or assignment, *Strader v. United States,* 10 Cir. 72 F. 2d 589, 593; *Williams v. United States,* 10 Cir. 66 F. 2d 868; *Bogileno v. United States,* 10 Cir. 38 F. 2d 584; *Kelly v. United States,* 10 Cir. 76 F. 2d 847.
>
> In a criminal case, it is the duty of a court to instruct on all essential questions of law, whether requested or not. *Kinard v. United States,* 68 App. D. C. 250, 96 F. 2d 522, 523; *Kreiner v. United States,* 2 Cir. 11 F. 2d 722, 731.

> The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, includes court procedure, rules of evidence, and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence, which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen."

In closing counsel wishes to emphasize that he believes it self evident that it cannot be determined from the record and proceedings had at the trial of petitioner what specific offense the jury found he had committed, nor the place or vicinity where the same had been performed. Counsel submits under the law and decisions of this Court no person has the right or authority to theorize or speculate that the jury (which obviously was confused by the testimony and instructions given them by the trial court) found the petitioner guilty of the offense charged in the indictment; that petitioner was not indicted by a grand jury for the offenses for which he was tried and further was denied due process of law as guaranteed by the Fifth Amendment to the Constitution for the United States.

VI.

CONCLUSION

In conclusion it is respectfully submitted, that the matters involved herein present substantial, meritorious and important Federal questions, that the Circuit Court of Appeals in this case has decided a Federal question in a way probably in conflict with applicable decisions of this Court, that the decisions of the Circuit Courts of Appeal on the questions here presented are in conflict with each other, that the Circuit Court of Appeals has sanctioned a

proceeding wherein the lower Court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision and is of such public interest and import as to warrant their review by this Court in the allowance of the Writ of Certiorari, as prayed.

CHARLES A. MEYER,
Counsel for Petitioner.

APPENDIX

Title 11, Sec. 52 (b) of U. S. C. A. previous to September 22, 1938 (italics added):

> "(b) A person shall be punished by imprisonment for a period of not to exceed five years upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, trustee, United States marshal, or other officer of the court charged with the control or custody of property, or *from creditors in composition* cases, any property belonging to the estate of a bankrupt; or (2) make a false oath or account in, or in relation to any proceeding in bankruptcy."

Title 11, Sec. 52 (b) of U. S. C. A. subsequent to September 22, 1938 (italics added):

> "b. A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000.00 or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property or *from creditors in any proceeding under this title,* any property belonging to the estate of a bankrupt; or (2) made a false oath or account in or in relation to any proceeding under this title; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in any proceeding under this title; personally, or by agent, proxy or attorney, or as agent, proxy or attorney; or (4) received any material amount of property from a bankrupt after the filing of a proceeding under this title, with intent to defeat this title."

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1033

PAUL DOUCHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 151–158) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 15, 1943 (R. 151). The petition for a writ of certiorari was filed May 18, 1943. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial judge committed reversible error in reading, at the outset of his charge, portions of the statute relating to offenses not charged in the indictment.

STATUTE INVOLVED

Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52b), as amended by the Act of May 27, 1926 (44 Stat. 665), provided in part:

> (b) A person shall be punished by imprisonment for a period of not to exceed five years upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, trustee, United States marshal, or other officer of the court charged with the control or custody of property, or from creditors in composition cases, any property belonging to the estate of a bankrupt; or (2) made a false oath or account in, or in relation to any proceeding in bankruptcy; or (3) presented under oath any false claim for proof against the estate of a bankrupt * * *

Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52b), as amended by the Act of June 22, 1938 (52 Stat. 855–856), provides in part:

> (b) A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000.00, or both, upon conviction of the offense of having knowingly and fraudulently (1) concealed from the receiver, cus-

todian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any proceeding under this title, any property belong to the estate of a bankrupt; or (2) made a false oath or account in or in relation to any proceeding under this title; (3) presented under oath any false claim for proof against the estate of a bankrupt, * * *

STATEMENT

Petitioner was indicted in the District Court of the United States for the Eastern District of Michigan on two counts charging concealment, on August 15, 1936, from Theodore Hughes, his trustee in voluntary bankruptcy, of real estate bonds of a par value of $6,200 and $20,000 (R. 113–115). The bonds were originally purchased in petitioner's name, for a time held in the name of Earle W. Evans, and in 1936 transferred to Mike Prodanov (R. 33), petitioner's brother (R. 49). Petitioner contended that the bonds were at all times his brother's property, having been purchased with the profits of an apartment house owned by the brother (R. 50–51, 54–55). The circuit court of appeals found that the evidence with respect to such property, most of which was introduced by the defense (R. 36–39, 40, 44, 45), supported the conclusion that petitioner owned the bonds at the time of the bankruptcy (R. 154).[1]

[1] A detailed analysis of the evidence appears in the opinion of the circuit court of appeals (R. 152–155) and is not given

The government, by the testimony of petitioner's broker, and by cross-examination of petitioner, brought out facts tending to prove that the apartment house and the bonds were registered in other names in order to avoid their attachment by petitioner's creditors (R. 31, 32, 56, 58, 59, 61).

At the outset of his charge to the jury, the trial judge read the first part of Section 29 (b) of the Bankruptcy Act, as amended in 1938,[2] omitting the punishment, but including the list of persons—receiver, custodian, marshal, creditors—mentioned in the section relating to concealment, and the section relating to false oaths (R. 87). Immediately thereafter he stated that the charge was in two counts for wilfully, knowingly, and fraudulently concealing two groups of bonds (R. 88). Later, in summarizing the contentions of both sides, the judge set forth the government's claim that petitioner, "because he was harassed by creditors, sought to play fast and loose with the property" (R. 91). He specifically instructed

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here since petitioner does not challenge the sufficiency of the evidence to support the conviction.

[2] The statute in effect at the time charged in the indictment was Section 29 (b) of the Bankruptcy Act (11 U. S. C. 52 b) as amended by the Act of May 27, 1926 (44 Stat. 665) rather than as amended by the Act of June 22, 1938 (52 Stat. 855–856). The applicable sections of the two statutes are set forth, *supra*, pp. 2–3. Insofar as material, the only difference is that the 1926 amendment limits concealment from creditors to composition proceedings, whereas the 1938 amendment refers to creditors "in any proceeding under this title."

the jury that events occurring before or after the bankruptcy were unimportant except as they bore upon petitioner's assets at the time of bankruptcy (R. 94). At the conclusion of his charge, the judge asked if further instructions were desired. Petitioner's attorney made one request—that the jury be instructed that petitioner must be found the sole owner—to which the judge acceded (R. 97). No objections were made to the charge.

Petitioner was found guilty and sentenced to serve a term of two years' imprisonment on each count, the sentences to run concurrently (R. 98). A motion to set aside the verdict (R. 137–146) was denied (Pet. 6). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment below was affirmed (R. 151).

ARGUMENT

Petitioner's sole contention (Pet. 6–7, 11–20) is that the inclusion in the judge's charge of inapplicable portions of the statute enabled the jury to base its verdict upon the commission of an offense not charged in the indictment. He complains particularly (Pet. 6–7, 12–13) that, in view of the evidence that petitioner had transferred his property in fraud of creditors, the verdict might have been founded on the 1938 amendment with respect to creditors. However, the charge as a whole,[3]

[3] It is settled that the trial court's charge to the jury must be considered in its entirety. *Graham* v. *United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *Martin* v. *United States*, 100

and the proceedings at the trial, show that the jury could not possibly have been misled.

After reading the statute, the trial judge specified that the charge was concealment of the bonds (R. 88). Then he pointed out to the jury that petitioner's defense was that he had never owned the bonds (R. 88). The jury could not have been misled. Throughout the trial it had been made clear that the concealment charged was from the trustee named in the indictment. Thus, early in the trial, the prosecutor explained before the jury that the introduction of the bankruptcy records was necessary to show the appointment of the trustee mentioned in the indictment (R. 13), and there was considerable testimony with respect to the trustee's appointment and qualification (R. 14–16). When the testimony concerned a successor trustee, the colloquies between court and counsel clearly indicated that defendant was indicted and could be convicted only for concealment from the first trustee (R. 20, 30). The importance of the first trustee was further emphasized by the colloquies before the jury regarding the procedure for getting the testimony of the first

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F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *United States* v. *McCann*, 32 F. (2d) 540, 542 (C. C. A. 2), certiorari denied, 280 U. S. 559; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735; see, also, *Clarke* v. *United States*, 132 F. (2d) 538, 541 (C. C. A. 9), certiorari denied, No. 776, this term, April 19, 1943; *United States* v. *Schenck*, 126 F. (2d) 702, 708, (C. C. A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705.

trustee (R. 34–35), and by the concession made by defendant's counsel, in lieu of such testimony, that the bonds were never turned over to the first trustee (R. 35–36). The testimony with respect to petitioner's difficulties with creditors prior to the bankruptcy (R. 31, 32, 42, 56, 58, 59, 61) was not likely to mislead the jury; it was relevant to the issue of petitioner's beneficial ownership of the bonds and his motive in registering title in another name (*United States* v. *Martel,* 103 F. (2d) 343, 344–345 (C. C. A. 2); *Arine* v. *United States,* 10 F. (2d) 778, 779 (C. C. A. 9); *Beaux Art Dresses* v. *United States,* 9 F. (2d) 531, 533 (C. C. A. 2), certiorari denied *sub nom. Todd* v. *United States,* 270 U. S. 644). In any event, any possibility that the jury might be misled was countered by the clear instruction that anything occurring prior to the bankruptcy was unimportant except as it tended to prove ownership of the bonds at the time of bankruptcy (R. 94).

By the conclusion of the trial, it was patent that the case turned, not upon whether the concealment had been from the trustee or from the creditors, but upon whether petitioner or his brother was the true owner of the bonds (cf. R. 31). That issue was clearly emphasized throughout the charge (R. 88, 92, 93, 94, 97). The proof that petitioner was the owner was so overwhelming that petitioner does not challenge the sufficiency of the evidence to sustain the conviction. It is therefore evident that the reading of the inapplicable portions of the statute could not have influenced the jury's

verdict and does not constitute reversible error (cf. *Clarke* v. *United States,* 132 F. (2d) 538, 541 (C. C. A. 9), certiorari denied, No. 776, this term, April 19, 1943; *Martin* v. *United States,* 100 F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *McNeil* v. *United States,* 85 F. (2d) 698, 704 (App. D. C.); *Britton* v. *United States,* 60 F. (2d) 772, 773–774 (C. C. A. 7), certiorari denied, 287 U. S. 669; *Burnstein* v. *United States,* 55 F. (2d) 599, 607 (C. C. A. 9), certiorari denied, 286 U. S. 550), a conclusion which is emphasized by the fact that petitioner's trial counsel, who heard the charge when it was given to the jury, did not then believe it to be confusing and requested only one change, which the judge promptly made.

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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